

AMENDED IN ASSEMBLY MAY 1, 2003

AMENDED IN ASSEMBLY APRIL 10, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1447**

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**Introduced by Assembly Member Matthews**

February 21, 2003

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An act to amend Section 25249.7 of the Health and Safety Code, relating to toxic substances.

LEGISLATIVE COUNSEL'S DIGEST

AB 1447, as amended, Matthews. Proposition 65: enforcement.

(1) The existing Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) prohibits any person, in the course of doing business, from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without giving a specified warning, or from discharging or releasing such a chemical into any source of drinking water, except as specified. The act imposes civil penalties upon persons who violate those prohibitions, and provides for the enforcement of those prohibitions by the Attorney General, a district attorney, or specified city attorneys or prosecutors, and by any person in the public interest. The act requires any person bringing an action in the public interest, or any private person filing an action in which a violation of the act is alleged, to notify the Attorney General that such an action has been filed. A private action under the act is required to be commenced not more than 60 days from the date that the person has given notice to the Attorney General and the

district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator.

This bill would authorize the Attorney General, on behalf of himself or any district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, to extend the time for review of the notice for up to 60 additional days. *The bill would require the written notice of an extension to include specified information and would provide that any statutes of limitations or equitable defenses to a private action be tolled during the time of the extension. The bill would prohibit evidence of the extension from being admitted in a private enforcement action for any purpose other than for determining the commencement of any statute of limitations or application of any equitable defense.*

*The bill would authorize a person bringing an action in the public interest to file an action to request preliminary injunctive relief to enjoin an ongoing or threatened violation of the act before the expiration of an extension.*

(2) The bill, in conformance with the requirements of Proposition 65, would make a legislative finding and declaration that these changes would further the purposes of the act.

Vote: <sup>2</sup>/<sub>3</sub>. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 25249.7 of the Health and Safety Code
- 2 is amended to read:
- 3 25249.7. (a) Any person that violates or threatens to violate
- 4 Section 25249.5 or 25249.6 may be enjoined in any court of
- 5 competent jurisdiction.
- 6 (b) (1) Any person who has violated Section 25249.5 or
- 7 25249.6 is liable for a civil penalty not to exceed two thousand five
- 8 hundred dollars (\$2,500) per day for each violation in addition to
- 9 any other penalty established by law. That civil penalty may be
- 10 assessed and recovered in a civil action brought in any court of
- 11 competent jurisdiction.
- 12 (2) In assessing the amount of a civil penalty for a violation of
- 13 this chapter, the court shall consider all of the following:
- 14 (A) The nature and extent of the violation.
- 15 (B) The number of, and severity of, the violations.



1 (C) The economic effect of the penalty on the violator.

2 (D) Whether the violator took good faith measures to comply  
3 with this chapter and the time these measures were taken.

4 (E) The willfulness of the violator's misconduct.

5 (F) The deterrent effect that the imposition of the penalty  
6 would have on both the violator and the regulated community as  
7 a whole.

8 (G) Any other factor that justice may require.

9 (c) Actions pursuant to this section may be brought by the  
10 Attorney General in the name of the people of the State of  
11 California, by any district attorney, by any city attorney of a city  
12 having a population in excess of 750,000, or, with the consent of  
13 the district attorney, by a city prosecutor in any city or city and  
14 county having a full-time city prosecutor, or as provided in  
15 subdivision (d).

16 (d) Actions pursuant to this section may be brought by any  
17 person in the public interest if both of the following requirements  
18 are met:

19 (1) (A) The private action is commenced more than 60 days  
20 from the date that the person has given notice of an alleged  
21 violation of Section 25249.5 or 25249.6 that is the subject of the  
22 private action to the Attorney General and the district attorney, city  
23 attorney, or prosecutor in whose jurisdiction the violation is  
24 alleged to have occurred, and to the alleged violator.

25 (B) The Attorney General may, on behalf of the Attorney  
26 General or the district attorney, city attorney, or prosecutor in  
27 whose jurisdiction the violation is alleged to have occurred, extend  
28 the time to review a notice served under this subdivision for a  
29 period of not more than 60 days, by serving written notice on the  
30 person who gave the notice under subparagraph (A) and on the  
31 governmental entities that were served with the notice under  
32 subparagraph (A). *The written notice shall specify the amount of*  
33 *time the Attorney General is extending the initial notice period, so*  
34 *that the time for tolling pursuant to subparagraph (C) is fixed to*  
35 *a date certain. The written notice shall also include a list of all*  
36 *persons who have been contacted in any investigation of the*  
37 *violation as of the date of issuance of the notice, and the reason that*  
38 *the extension is being exercised.*

39 (C) *Any statute of limitations or equitable defense to a private*  
40 *action brought pursuant to this section shall be tolled during the*

1 *time period of the extension granted pursuant to subparagraph*  
2 *(B).*

3 *(D) An extension by the Attorney General pursuant to*  
4 *subparagraph (B) is not admissible in a private enforcement*  
5 *action for any purpose other than for determining the*  
6 *commencement of any statute of limitations or application of any*  
7 *equitable defense.*

8 *(E) Prior to the expiration of an extension by the Attorney*  
9 *General pursuant to subparagraph (B), a person bringing an*  
10 *action in the public interest, upon a showing of good cause, may*  
11 *file an action for the purpose of requesting preliminary injunctive*  
12 *relief to enjoin an ongoing or threatened violation of this chapter*  
13 *pursuant to paragraph (1) of subdivision (a).*

14 ~~(F)~~

15 *(F) If the notice alleges a violation of Section 25249.6, the*  
16 *notice of the alleged violation shall include a certificate of merit*  
17 *executed by the attorney for the noticing party, or by the noticing*  
18 *party, if the noticing party is not represented by an attorney. The*  
19 *certificate of merit shall state that the person executing the*  
20 *certificate has consulted with one or more persons with relevant*  
21 *and appropriate experience or expertise who has reviewed facts,*  
22 *studies, or other data regarding the exposure to the listed chemical*  
23 *that is the subject of the action, and that, based on that information,*  
24 *the person executing the certificate believes there is a reasonable*  
25 *and meritorious case for the private action. Factual information*  
26 *sufficient to establish the basis of the certificate of merit, including*  
27 *the information identified in paragraph (2) of subdivision (h), shall*  
28 *be attached to the certificate of merit that is served on the Attorney*  
29 *General.*

30 *(2) Neither the Attorney General, any district attorney, any city*  
31 *attorney, nor any prosecutor has commenced and is diligently*  
32 *prosecuting an action against the violation.*

33 *(e) Any person bringing an action in the public interest*  
34 *pursuant to subdivision (d) and any person filing any action in*  
35 *which a violation of this chapter is alleged shall notify the Attorney*  
36 *General that the action has been filed. Neither this subdivision nor*  
37 *the procedures provided in subdivisions (f) to (j), inclusive, affect*  
38 *the requirements imposed by statute or a court decision in*  
39 *existence on January 1, 2002, concerning whether any person*

1 filing any action in which a violation of this chapter is alleged is  
2 required to comply with the requirements of subdivision (d).

3 (f) (1) Any person filing an action in the public interest  
4 pursuant to subdivision (d), any private person filing any action in  
5 which a violation of this chapter is alleged, or any private person  
6 settling any violation of this chapter alleged in a notice given  
7 pursuant to paragraph (1) of subdivision (d), shall, after the action  
8 or violation is subject either to a settlement or to a judgment,  
9 submit to the Attorney General a reporting form that includes the  
10 results of that settlement or judgment and the final disposition of  
11 the case, even if dismissed. At the time of the filing of any  
12 judgment pursuant to an action brought in the public interest  
13 pursuant to subdivision (d), or any action brought by a private  
14 person in which a violation of this chapter is alleged, the plaintiff  
15 shall file an affidavit verifying that the report required by this  
16 subdivision has been accurately completed and submitted to the  
17 Attorney General.

18 (2) Any person bringing an action in the public interest  
19 pursuant to subdivision (d), or any private person bringing an  
20 action in which a violation of this chapter is alleged, shall, after the  
21 action is either subject to a settlement, with or without court  
22 approval, or to a judgment, submit to the Attorney General a report  
23 that includes information on any corrective action being taken as  
24 a part of the settlement or resolution of the action.

25 (3) The Attorney General shall develop a reporting form that  
26 specifies the information that shall be reported, including, but not  
27 limited to, for purposes of subdivision (e), the date the action was  
28 filed, the nature of the relief sought, and for purposes of this  
29 subdivision, the amount of the settlement or civil penalty assessed,  
30 other financial terms of the settlement, and any other information  
31 the Attorney General deems appropriate.

32 (4) If there is a settlement of an action brought by a person in  
33 the public interest under subdivision (d), the plaintiff shall submit  
34 the settlement, other than a voluntary dismissal in which no  
35 consideration is received from the defendant, to the court for  
36 approval upon noticed motion, and the court may approve the  
37 settlement only if the court makes all of the following findings:

38 (A) Any warning that is required by the settlement complies  
39 with this chapter.

1 (B) Any award of attorney's fees is reasonable under California  
2 law.

3 (C) Any penalty amount is reasonable based on the criteria set  
4 forth in paragraph (2) of subdivision (b).

5 (5) The plaintiff subject to paragraph (4) has the burden of  
6 producing evidence sufficient to sustain each required finding.  
7 The plaintiff shall serve the motion and all supporting papers on  
8 the Attorney General, who may appear and participate in any  
9 proceeding without intervening in the case.

10 (6) Neither this subdivision nor the procedures provided in  
11 subdivision (e) and subdivisions (g) to (j), inclusive, affect the  
12 requirements imposed by statute or a court decision in existence  
13 on the January 1, 2002, concerning whether claims raised by any  
14 person or public prosecutor not a party to the action are precluded  
15 by a settlement approved by the court.

16 (g) The Attorney General shall maintain a record of the  
17 information submitted pursuant to subdivisions (e) and (f) and  
18 shall make this information available to the public.

19 (h) (1) Except as provided in paragraph (2), the basis for the  
20 certificate of merit required by subdivision (d) is not discoverable.  
21 However, nothing in this subdivision precludes the discovery of  
22 information related to the certificate of merit if that information is  
23 relevant to the subject matter of the action and is otherwise  
24 discoverable, solely on the ground that it was used in support of the  
25 certificate of merit.

26 (2) Upon the conclusion of an action brought pursuant to  
27 subdivision (d) with respect to any defendant, if the trial court  
28 determines that there was no actual or threatened exposure to a  
29 listed chemical, the court may, upon the motion of that alleged  
30 violator or upon the court's own motion, review the basis for the  
31 belief of the person executing the certificate of merit, expressed in  
32 the certificate of merit, that an exposure to a listed chemical had  
33 occurred or was threatened. The information in the certificate of  
34 merit, including the identity of the persons consulted with and  
35 relied on by the certifier, and the facts, studies, or other data  
36 reviewed by those persons, shall be disclosed to the court in an in  
37 camera proceeding at which the moving party shall not be present.  
38 If the court finds that there was no credible factual basis for the  
39 certifier's belief that an exposure to a listed chemical had occurred  
40 or was threatened, then the action shall be deemed frivolous within

1 the meaning of Section 128.6 or 128.7 of the Code of Civil  
2 Procedure, whichever provision is applicable to the action. The  
3 court shall not find a factual basis credible on the basis of a legal  
4 theory of liability that is frivolous within the meaning of Section  
5 128.6 or 128.7 of the Code of Civil Procedure, whichever  
6 provision applies to the action.

7 (i) The Attorney General may provide the factual information  
8 submitted to establish the basis of the certificate of merit on  
9 request to any district attorney, city attorney, or prosecutor within  
10 whose jurisdiction the violation is alleged to have occurred, or to  
11 any other state or federal government agency, but in all other  
12 respects the Attorney General shall maintain, and ensure that all  
13 recipients maintain, the submitted information as confidential  
14 official information to the full extent authorized in Section 1040  
15 of the Evidence Code.

16 (j) In any action brought by the Attorney General, a district  
17 attorney, a city attorney, or a prosecutor pursuant to this chapter,  
18 the Attorney General, district attorney, city attorney, or prosecutor  
19 may seek and recover costs and attorney's fees on behalf of any  
20 party who provides a notice pursuant to subdivision (d) and who  
21 renders assistance in that action.

22 SEC. 2. The Legislature finds and declares that this act  
23 furthers the purposes of the Safe Drinking Water and Toxic  
24 Enforcement Act of 1986.

